IN THE HIGH COURT OF BOMBAY AT GOA
PANAJI, GOA.

WRIT PETITION NO. 344 OF 2006

1. M/s.Pratibha Industries
   Ltd., Mumbai.
2. Vinayak Kulkarni,
   Mumbai. ... Petitioners.

V/s.

1. State of Goa.
2. Executive Engineer Works,
   Works Division XII (PHE),
   Sanaguem, Goa.
3. Superintending Engineer,
   Circle Office VI, PWD
   Althino, Panaji, Goa. ... Respondents.

A.N.S.Nadkarni, senior counsel with
Neelesh A. Takkekar for the petitioners.

S.S.Kantak, Advocate General with Ms.L.
Dharwadkar for the respondents.

CORAM : V.C.DAGA AND
N.A. BRITTO, JJ.

DATED : 31ST AUGUST, 2006.

ORDER :

Rule returnable forthwith.

By consent of parties, petition is taken up for final hearing and disposal.

Mr.Kantak, learned Advocate General appearing with Ms.L.Dharwadkar, AGA waives service on behalf of the respondents.

2. Heard learned counsel for the rival parties.

3. The petitioners, by this petition filed under Article 226 of the Constitution of India, is challenging the tender invitation dated 28th July,2006 which stipulates that the tenderer should be a contractor registered in appropriate class and category of Goa PWD/WRD and CPWD (hereinafter called as “registered contractor” for the sake of brevity) and by implication excludes the contractors who are not registered (hereinafter called as “unregistered contractor”).

4. The challenge set up and canvassed during the course of oral submissions is that there is no power in the State Government to make rule like one published in the official Gazette in notification dated 12th August, 2004 known as “Rules of Enlistment of Contractors in Public Works Department (PWD)/ Water Resources Department (WRD), Goa, 2004” (“Rules” for short); which incorporates amongst others clause 5.2; which, according to the petitioners, is violative of Articles 14 and 19(1)(g) of the Constitution of India. The said clause reads as under:

> “**5.2** No tender form shall be issued to a contracting firm unless it is registered in PWD/ WRD, Goa in appropriate Class and Category except for specialized jobs, for which pre-qualifications and pre-conditions are required to be decided by the Head of the department of PWD/ WRD, Goa.”

Submissions :

5. Mr.Nadkarni, learned counsel appearing for the petitioners urged that the classification made by rule 5.2 of the Rules, based on the registration with a particular State, cannot be said to be a reasonable

classification and that there is no nexus between the classification and the object it seeks to achieve and, thus, rule 5.2 is violative of Article 14 of the Constitution of India.

6. Mr.Nadkarni further submits that by refusal to issue pre-qualification documents the respondents are preventing the petitioners from participating in the tender process for the said work and puts an unreasonable restriction on the fundamental right of the petitioners to trade, guaranteed under Article 19(1)(g) and that the petitioners are being discriminated by permitting such rule to operate. In his submission, the invitation to only those contractors who are enlisted under Goa PWD and CPWD for pre-qualification tender amounts to discrimination violative of Article 14; being arbitrary and without any intelligible differentia.

7. Mr.Nadkarni placed reliance on the judgment of the Apex Court in the case of ***Rashbihari Panda*** **v.** ***State of Orrissa***, AIR 1959 SC 1081; ***Ramprasad*** **v.** ***State of Bihar***, AIR 1955 SC 215; ***Ramana*** **v.** ***I.A.Authority of India***, AIR 1979 SC 1628; ***K.Thimapa*** **v.** ***Chairman, Central***

Board of Directors, SBI in support of his submissions and prayed for suitable directions to the respondents by granting his prayers in the petition.

8. Per contra, Mr.Kantak, learned Advocate General appearing for the respondents submits that it is for the State Government to lay down eligibility criteria and decide the category and class of the contractors from whom the tenders should be invited. For enlistment as a Contractor under the said rules, there are certain eligibility criteria prescribed and enlistment is done under various classes and in different categories. Each State may have different eligibility criteria for being classified as a Contractor in a particular class. Mere enlistment as a Contractor, therefore, in any other State with their PWD department does not entitle such contractor to tender for works in this State.

9. He, thus, submits that the petitioners having not been registered with Goa PWD/WRD,CPWD are not eligible to participate in tender process. Government

has not restricted competition only to contractors registered with the State of Goa but has, in fact, widened the competition by inviting tenders from contractors registered with CPWD, it being a central agency of the Union of India.

10. Mr.Kantak urged that the decision to invite tenders from the contractors from State PWD/WRD/CPWD does not violate any of the fundamental rights of the petitioners and classification is reasonable; not hit by Article 14 of the Constitution of India.

11. He further urged that the terms of the tender conditions are nothing but incorporation of the policy decision of the State by reference, the same is neither arbitrary nor discriminatory as such no judicial interference is called for. He further canvassed that the terms of invitation of tender are not open to judicial scrutiny the same being in the realm of contract unless they are arbitrary or discriminatory or actuated by malice.

12. Mr.Kantak, in addition to above submission further urged that the very same challenges were considered and repelled by the Division Bench presided over by the then Hon'ble Chief Justice Shri Dalveer Bhandari in the case of Ibrahim's v. State of Goa and Anr. In Writ Petition No.63/2005, decided on 18th March, 2005 (unreported) to which one of us (Britto, J,) is a party. Thus, in his submission, there is no need to reconsider the matter afresh. He has also circulated copy of the said order along with copy of the writ petition for our perusal.

13. Mr.Kantak in support of his submissions relied upon few judgments of the Apex Court to bring home his submissions, viz. ***Krishna Kakkanth*** **v.** ***Govt. of Kerala***, AIR 1997 SC 128; ***Director of Education v. Educomp Datamatics Ltd.***, AIR 2004 SC 1962; ***Global Energy Ltd.*** **v.** ***Adani Exports Ltd.*** He urged that the petition is devoid of any merit and the same is liable to be dismissed.

Consideration :

14. We have perused the impugned Rules in general, framed by the State Government referable to Article 162 of the Constitution of India; and rule 5.2 in particular which lays down that no tender forms shall be issued to a contracting firm unless it is registered in PWD/WRD Goa in appropriate class and category except for specialized jobs, for which pre-qualifications and pre-conditions are required to be decided by the Head of the Departments of PWD/ WRD, Goa.

15. The aforesaid rule in particular has been incorporated by reference in the tender invitation by way of policy decision of the State. The same is subject matter of challenge in this petition on the touchstone of Articles 14 and 19(1)(g) of the Constitution of India.

16. What Article 14 prohibits is class legislation and not reasonable classification for the purpose of legislation. If the rule-

making authority takes care to reasonably classify persons for a particular purpose and if it deals equally with all persons belonging to a well-defined class then it would not be open to the charge of discrimination. But to pass the test of permissible classification two conditions must be fulfilled:

> (a) that the classification must be founded on an intelligible differntia which distinguishes persons or things which are grouped together from others left out of the group; and
>
> (b) that the differntia must have a rational relation to the object sought to be achieved by the statute in question.

The classification may be founded on different basis and what is necessary is that there must be a nexus between the basis of classification and the object under consideration.

17. Article 14 of the Constitution does not insist that the classification should be scientifically perfect and a court would not interfere unless the alleged classification results in apparent inequality.

18. When a law is challenged to be discriminatory; essentially on the ground that it denies equal treatment or protection; the question for determination by court is not whether it has resulted in inequality but whether there is some difference which bears a just and reasonable relation to the object of legislation. Mere differentiation does not *per se* amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis, having regard to the object which the legislature has in view. If a law deals with member as of a well-defined class then it is not obnoxious and it is not open to the charge of denial of equal protection on the ground that it has no application to

other persons. It is for the rule-making authority to determine what categories of persons would embrace within the scope of the rule and merely because some categories which would stand on the same footing as those which are covered by the rule are left out, would not render the rule or the law enacted in any manner discriminatory and violative of Article 14. It is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases. It depends on the object of the legislation, and what it really seeks to achieve.

19. Considered from above stand point view the Rule 5.2 makes a classification between registered and unregistered contractors. Registered contractor with the department of the State and/or local and/or statutory authorities is a well known concept in the field of commerce. The registered contractor enjoys the privilege to do business with whom that contractor or supplier is registered as per the rules or guidelines framed by the registering authority. The idea behind

registration of the contractor or supplier is to verify his creditability; worth; goodwill; financial capacity; or professional and/or technical qualifications depending upon the nature or requirement of that particular registering department and to recognise such registered person or contractor for a specified type of contract or work.

20. Bearing in mind the above philosophy, the Rules appear to have been framed by the State of Goa in exercise of their executive powers. With this, let us turn to rule 5.2 of the Rules to find out whether or not the classification is founded on illegible differentia. It is now well established that while Article 14 of the Constitution forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the Group and (ii), that the classification must have a rational

relation to the object sought to be achieved by the statute in question as laid down by the Apex Court in the case of ***Budhan Chowdhury* v. *tate of Bihar***, AIR 1955 SC 191.

21. Applying this test, if one turns to the rules framed by the State of Goa for enlisting of contractors in PWD and procedure laid down for enlisting, it would be clear that one has to apply for enlisting as contractor with the Government of Goa disclosing all details about his credentials; infrastructure including the works undertaken by him in the past. He is also required to disclose the details of full-time technical staff employed by him; T & P Machinery; equipments and work shop and the various licences held by him. He is also required to disclose as to whether any person working with him is a near relative of the officer/ official of Goa PWD/WRD. He is required to provide information with details of the works completed and in progress which were secured by him during past five years. He has to produce various documents such as partnership deed in case of partnership firm; and

Articles of Association in case of private/ public limited company, both duly attested by Notary Public; solvency certificate; list of technical staff; attested copy of valid electrical licence is also required to give other details as required by the prescribed form of the application.

22. After going through rigorous compliance of the aforesaid details, a person gets registered or enlisted as a Contractor in PWD of Goa. It is, therefore, clear that enlisted contractor or registered contractor is a class by himself. Two classes of registered and unregistered contractors are founded on an intelligible differntia which distinguishes persons or things that are grouped together from others left out of the Group. The second test that the classification must have a rational relation to the object sought to be achieved by the rule in question also stands answered in view of the fact that the object of the rule is to verify the credentials; goodwill and antecedent of the person with whom the Government is dealing. The Government is a

custodian of the public funds. Moreover a contract would involve expenditure from State Exchequer or augmentation of public revenue and consequently power to award contract has to be exercised keeping in view the public interest in such selection. It spends public money and, therefore, it is very much essential for the government to know the credential of the person with whom it is dealing. So long as rule lays down relevant objective criteria and entrust its selected business to qualified person, this Court cannot, obviously, have any say in the matter. Considered from this aspect, the classification made between the registered and unregistered contractors by the State cannot be faulted on the touchstone of Article 14 of the constitution.

23. Considered from another angle, the Apex Court judgment in the case of ***Ramana Dayaram Shetty*** (supra) has recognised an expression “registered contractor” and held that the classification of registered and unregistered contractors is not aimless or insensible. The registration of a contractor

is neither meaningless nor futile exercise. It has a definite purpose in view when it laid down this condition of eligibility in the tender invitation notice. This condition is recognised as a condition of eligibility which the Government is entitled to prescribe which is clear from para-7 of the said judgment.

24. The challenge on the score of Article 14 of the Constitution of India, therefore, must fail on this count.

25. Turning to the second aspect of challenge based on the touchstone of Article 19(1)(g), there is no fundamental right in a citizen to carry on business whatever he chooses and his right must be subject to reasonable restrictions imposed by the executive authority in the interest of public convenience as laid down by the Apex Court in the case of ***T.B.Ibrahim*** **v.** ***Regional Transport Authority***, AIR 1953 SC 79. It has also been reported in the case of ***Achutan C.K.*** **v.** ***State of Kerala***, AIR 1959 SC 490 that there is no fundamental right to enter

into contractual relations with the Government. But even an individual has no legal right to carry on business with the Government.

26. The Apex Court in the case of **Krishna Kakkanth *v.* Govt. of Kerala** (supra) ruled as under:

> " It may be indicated that although a citizen has a fundamental right to carry on a trade or business, he has no fundamental right to insist upon the Government or any other individual for doing business with him. Any Government or an individual has got a right to enter into contract with a particular person or to determine person or persons with; whom he or it will deal."

The Government, however, must deal with all persons fairly, reasonably and in the public interest; and where objective tests or conditions for eligibility have been prescribed, they must be observed by the authority concerned as laid down by the Apex Court in the case of ***Ramana Dayaram Shetty* v. *I.A.Authority of India***, AIR 1979 SC 1628.

27. A constitution Bench of the Apex Court in the case of ***Rai Sahib Ram Jawaya Kapur*** **v.** ***State of Punjab***, (1955) 2 SCR 225: (AIR 1955 SC 549) while dealing with similar restrictions imposed by the State on the purchase of text books held that a publisher did not have the right to insist on any of their books being accepted as text books. The Apex Court held :

> "So the utmost that could be said is that there was merely a chance or prospect of any or some of their books being approved as text books by the Government. Such chances are incidental to all trades and businesses and there is no fundamental right guaranteeing them. A trader might be lucky in securing a particular market for his goods but he loses that field because the particular customers for some reason or other do not choose to buy goods from him, it is not open to him to say that it was his fundamental right to have his old customers for ever."

Further, while negativing the contention of the petitioner in that case based on Article

19(1)(g) of the Constitution, the Court came to the conclusion that the question whether the Government could establish a monopoly without any legislation under Article 19(1)6) of the constitution is altogether immaterial.

28. In ***Naraindass Indurkhya v. State of M.P.***, (1974) 4 SCC 788: (AIR 1974 SC 1232) another Constitution Bench of the Apex Court held following the judgment in ***Rai Sahib Ram Jawaya Kapur's case*** (supra) that there is no right in a publisher that any of the books printed and published by him should be prescribed as text books by the school authorities or if they are once accepted as text books they cannot be stopped or discontinued in future. As a matter of fact, in the said case, the Apex Court approved the action of the State in restricting the sale of text books not only to the State run schools but also all other institutions which sought recognition from the Government, on the ground that one of the main conditions on which recognition is granted by the State Government is that the school authorities must use as text books only those which are

prescribed or authorities by the State Government.

29. In this case as well as in ***Ram Jawaya's*** case (supra), the Apex Court further accepted the authority of the State to issue directions restricting the sale of the text books by an executive order under Article 162 of the Constitution on the basis that the executive power of the State extends to all matters with respect to which the State Legislature has power to make law and in the absence of there being any law, the said field could be covered by an executive action.

30. While dealing; with the right of a State in giving preference to co-operative societies in the matter of allotment of fair price shops, the Apex Court in the case of ***Sarkari Sasta Anaj Vikreta Sangh, Tahsil Bemetra*** **v.** ***State of M.P.***, (1981) 4 SCC 471: (AIR 1981 SC 2030 at p.2035, para 11) held:

> "Co-operative Societies play positive and progressive role in the economy of our country and most

> surely, in the fair and effective distribution of essential articles of food. There certainly was a reasonable classification and a nexus with the object intended to be achieved, which was a fair and assured supply of rations, to the consumer. The fundamental right of traders like the petitioners to carry on business in foodstuffs was in no way affected. They could carry on trade in foodstuffs without hindrance as dealers; only, they could not run fair price shops as agents of the Government. No one could claim a right to run a fair price shop as an agent of the Government. All that he could claim was a right to be considered to be appointed as an agent of the Government to run a fair price shop. If the Government took a policy decision to prefer consumers' co-operative societies for appointment as their agent to run fair price shops, in the light of the frustrating and unfortunate experience gathered in the last two decades, there can be no discrimination."

31. The above quoted view of the Apex Court, in our opinion, answers the contentions raised on behalf of the petitioners with reference to Article 19(1)(g) of the Constitution.

32. The heavy reliance was placed by Mr.Nadkarni on the Apex Court judgment in the case of ***Rashbihari Panda*** **v.** ***State of Orrissa*** (supra); wherein it is held that the Government cannot invite offers for advance purchase of Tendu leaves confined only from purchasers during previous years, who had carried out their obligation to the satisfaction of the Government in preference to the open competition. This case is distinguishable on facts. In this case, there was a total prohibition to consider offers received from those who did not carry out their obligation to the satisfaction of the government in the previous year. This is not the situation in the case at hand. Here, there is no total prohibition; subject to registration, anybody qualifying in that category can compete in the tender process. Thus, heavy reliance placed on this judgment by Mr.Nadkarni is misplaced.

33. In the case of ***Directorate of Education*** **v.** ***Educomp Datamatics Ltd.,*** (2004) 4 SCC 19, the Apex Court ruled as under:

> "The terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. The Govt. must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Govt. because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

34. In the case of ***Global Engineering* v. *Adani*** (supra), the Apex Court reiterating the law laid down in the case of ***Tata Cellular* v. *Union of India***, AIR 1996 SC 11 observed as under:

> " ..... In appeal, this Court reversed the judgment of the High Court basically on the ground that

the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract and the Government must be a free hand in settling the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. It was further held that while exercising the power of judicial review of the terms of the tender notice, the Court can not order change in them.

The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this court, it is rather surprising that the learned single Judge passed an interim direction on the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a Bank guarantee or a bankers' cheque till three days after the actual date of opening of the tender. The order of the learned single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench."

35. The view taken herein also finds support from the earlier order of the Division Bench in the case of ***T.B.Ibrahim*** (supra) on which strong reliance is placed by the Advocate General. The said case deals with almost same contentions raised in this petition wherein judicial scrutiny of rule 5.2 was undertaken by this Court. In the above view of the matter, the petition is devoid of any substance. The same is liable to be dismissed.

In the result, petition is dismissed. Rule stands discharged with no order as to costs.

(V.C. DAGA, J.)

(N.A. BRITTO, J.)

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